April 18, 2007

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Re: WC Docket No. 06-210
CCB/CPD 96-20

Ex-Parte Comments of 800 Discounts, Inc., One Stop Financial, Inc., Winback & Conserve Program, Inc. and Group Discounts, Inc

Response to AT&T's Opposition for Summary Decision

With these comments the FCC will clearly see that AT&T's attempt to cover-up for

1) AT&T's November 28th 1995 concession brief on obligations allocation
and
2) Judge Bassler's error in reading the FCC Decision

is thoroughly destroyed by petitioners.

On its face there is absolutely no doubt what AT&T's counsel Mr. Whitmer was explaining to the District Court when Mr. Whitmer was discussing plan obligations:

> These charges are all **"tariffed" obligations,** for which CCI, **"not PSE"** (which would have the revenue stream to satisfy such charges), **would be obligated.**

You can not get anymore explicit!!! Judge Politan clearly understood what AT&T's counsels position was regarding the allocation of obligations **as per the tariff.** Mr. Whitmere clearly associates that traffic only transaction as per what the tariff calls for. He explicitly stated these are all "tariffed" obligations.

Take a look at the District Courts March 1996 Decision page 17 para 1 that was issued by Judge Politan as a result of AT&T Counsels position on plan obligation allocation:

Petitioners exhibit "Reply B" in its 1/31/07 filing.

> Thirdly, AT&T has little or no danger of being harmed should the sought-for relief be granted. Its economic risk, if any, would arguably be covered by an anticipated excess over commitment under Contract No. 516, **[FOOTNOTED HERE]** and/or by its increase in revenue by dint of acquiring plaintiffs' customers as they are siphoned into Contract No. 516 by alternative avenues. Indeed the Court notes that the services provided by AT&T are billed directly to the end user who in turn remits payment directly to AT&T.
> **The instant injunction does not change that, nor does it increase the risk that the end user shall not pay.** Other interested parties --among them, end users themselves --face no threat of harm should the relief sought be granted
> **[FOOTNOTE FROM ABOVE]**
> As previously referenced, **AT&T's counsel represented** that AT&T has initiated suit against PSE for shortfalls. **In analyzing the instant motion**, however, and in light of the fact that that suit was for the first time referenced orally at the hearing on this motion, the Court is not deterred by such litigation. **Indeed, AT&T's own counsel focused the issue by indicating that the tariffed obligations "*involved herein*" are all tariffed obligations, for which "CCI, not PSE" would be obligated.**

Judge Politan clearly stated that he was **analyzing the instant motion** and applied AT&T's **"own counsels" position** on the transaction **"involved herein",** under the tariff. No more explicit a statement could there be.

There was no language about a proposed transaction outside the scope of 2.1.8. AT&T's nonsense about petitioner's transaction being a "proposal" outside the norm is pure AT&T nonsense.

AT&T wanted petitioners to have to transfer its plan due to the substantial traffic only transfer as per AT&T's Tr.8179 request that was denied, as AT&T counsel Mr. Carpenter conceded to the Third Circuit, by the FCC.

CCI, PSE, and Petitioner's have all Submitted Certifications to the Court and Evidence Showing the Transaction

was Requested to be Properly Done Under the Tariff

PSE's cover letter that was given to AT&T with the "traffic only" transaction explicitly states PSE is doing a **"proper"** submission as it had done many times before allowing many other CSTPII/RVPP 28% aggregators to transfer traffic only to PSE's 66% CT-516 plan. See the paperwork submitted to AT&T which (on page 4 of exhibit F to petitioner's initial filing) PSE states:

> Please find a **properly executed** AT&T transfer of Service Agreement (TSA) to move all of the end-user locations, except the 181 account number and the 131 lead number into PSE's CT516. (CSTP/RVPP Plan ID #003690)

PSE did **NOT** tell AT&T, ----as AT&T lies 12 years later--- that it was proposing a transaction that did not conform to the tariff. The evidence does not lie.

CCI which has submitted a certification to the District Court and also made extensive comments in this proceeding has also stated that there was no request to go outside the 2.1.8 transfer sections normal tariffed allocation of obligations.

Petitioner's also explained to the FCC in its 2003 public comments that the transaction was done **as per the tariff:** DC Circuit Joint Appendix pg. 446 Para 53

> In fact ***the tariff*** and AT&T's own form, the **Transfer of Service or Assignment** (TSA) form, made it possible. We did an assignment of end-user accounts ***as per the tariff*** and what had been commonly accepted in the marketplace for years.

The record clearly shows that when AT&T received the AT&T Transfer of Service (TSA) forms from PSE AT&T immediately ran to the FCC. This is evidenced by the Freedom of information Act (FOIA) notes and the letter from AT&T Counsel Richard Meade to the FCC's David Nall.

Then AT&T counsel Fred Whitmere sent a letter to petitioners in February 6th 1995 (See Exhibit X to petitioners initial filing) acknowledging that shortfall obligations stayed with the transferring plan.

Mr Whitmers' clear statement was made before the obligations issue was the focus and before petitioners statement to the Court that that S&T obligations are not transferred on traffic only transfers.

Mr. Whitmer did not realize he was inadvertently spilling the beans on plan obligation allocation in his Feb 6th 1995 letter and November 28th 1995 brief:

AT&T Counsel Mr. Whitmer: Feb 6th 1995:

> Mr. Inga's efforts to transfer these end users and **leave the plans intact with their commitments,** …..AT&T will seek to enforce its rights in the event shortfall and termination charges become due **under the tariff** and will hold Mr. Inga personally liable for his conduct intended to deprive AT&T of its **tariff charges**.

Mr. Whitmer above associated petitioner's traffic only transaction to what the tariff calls for.

It was not until petitioners filed its suit with the District Court ***after all these events took place*** did petitioners make the correct tariff statement that the transferors plans revenue commitments and associated shortfall and termination costs do not transfer on "traffic only" transfers.

The point is that **AT&T BY ITS VERY ACTIONS,** clearly acknowledged **that under the tariff** the plan obligations of the transferors plan must stay with the transferors plan, as AT&T's November 1995 concession indicates.

It was AT&T who then attempted to utilize its fraudulent use provisions bogusly stating that petitioners were certain to go into shortfall due to the fact that the transferors kept the shortfall obligations but would not have the accounts to satisfy the shortfall. It was not until AT&T's Dec 20th 2006 brief did AT&T finally conceded that the plans were still pre June 17th 1994 grandfathered through at least June of 1996. Back in 1995 AT&T argued Fraudulent Use using the bogus position that that transferor plans would certainly go into shortfall. Only 12 years later did AT&T concede that AT&T's Fraudulent Use assertion was a totally bogus assertion because it knew that plans were all grandfathered and thus immune from S&T charges.

Additionally see exhibit R in petitioner's 9/27/06 filing in which all of the aggregators (including Charlie Hunter representing the entire resellers Association) filed petitions to reject or suspend Tr. 8179.

All these aggregators asserted that they had always done traffic only transfers without plan obligations being transferred. **Petitioner's transaction was done just as all these other fellow aggregators**--- that is why they all came to the rescue of petitioners when AT&T attempted to retroactively enact Tr.8179. AT&T's ridiculous assertion that petitioner's were proposing a transaction outside of what section 2.1.8's norm was--- is pure fantasy. Petitioners were participating in a transaction just as it always had.

The only difference was that the amount of traffic was larger than normal; however there is no cap restrictions under the tariff on the percentage of account traffic that can transfer on a "traffic only" transfer.

AT&T counsel Richard Meade argued to the FCC in AT&T's Substantive Cause Pleading that petitioners **had followed the proper tariff methodology** but AT&T was made because it believed that substance (the amount of accounts transferred) should have superseded the "form" (the correct tariff procedure).

AT&T counsel Richard Meade stated in a February 16, 1995 letter to the FCC's

David Nall:

> AT&T is filing "at this particular time" to prevent a transaction that (at the minimum) elevates form over substance in an effort to avoid payment of shortfall charges.

The FCC ruled against AT&T's substance over form argument. The FCC acknowledged that it was the proper tariff methodology (i.e. tariff form) that petitioner's followed that the FCC was concerned with. This quote of Mr. Meade also confirms his understanding that shortfall would stay with the transferors plans as Mr. Meade bogusly asserts the transaction was an attempt to avoid shortfall.

The bottom line is that the evidence clearly shows that the proper tariff methodology (i.e. form) was utilized by petitioners and AT&T's rhetoric that petitioner's were proposing a transaction that was outside 2.1.8's normal obligations allocation methodology is false. The size of the transaction is not relevant under section 2.1.8 nor any other tariff provision. The plans were all grandfathered and the aggregate fiscal year commitments had already been made in any event.

The Key to the Case----Where Is AT&T's Evidence?

AT&T's new assertion after 12 years is that petitioner's transaction was a "***proposal"*** to act outside the tariff and not transfer shortfall and termination (S&T) obligations" when according to only AT&T, 2.1.8 normally mandated the transfer of S&T obligations on "traffic only" transfers.

Therefore according to AT&T this would mean that normally AT&T has always, and continues to this day, to always transfer revenue commitments/S&T obligations on traffic only transfers. Therefore if this is the so called AT&T norm---------- **where is the all the evidence?**

Conspicuously absent in AT&T's 12 year mockery of the justice system is one single example showing S&T obligations transferring on a traffic only transfer!!! The evidence that has been submitted showing previous traffic only transfers all supports petitioners tariff analysis. See traffic only transfer examples at exhibit Y in petitioner's 9/27/06 filing. [1]

Remember AT&T claimed that 2.1.8 is its transfer section for all sorts of traffic only transfers:
(Corporate division sell offs, divestitures, mergers and acquisitions, resale traffic transfers etc) AT&T claims it has done tens of thousands of these traffic only transfers and of course still does them today!

The reason why AT&T can not show any evidence is because none exists!!! The tariffed norm under 2.1.8 is not to transfer the plans revenue commitment/S&T obligations on a traffic only transfer, as former long time AT&T executive Joseph J. Kearny has additionally confirmed in his comments to the FCC.

Joseph J. Kearney has submitted public comments explaining that he was very familiar with AT&T's Transfer of Service section 2.1.8 and explicitly stated "the transferor's revenue commitments including its associated shortfall and termination obligations do not transfer on a traffic only transfer." That was and still is the norm.

There was no so called *proposal* by petitioners to act outside of section 2.1.8. AT&T simply has been snagged again in another gross misrepresentation. But what else is new.

AT&T's Obligation Concession Is No Less of A Concession Because it was Found Under AT&T's Request for a Fifteen Million Injunction Bond ---It only further Proves Petitioners Case

Judge Politan clearly understood the traffic only transfers ramifications under the tariff. See the 1996 Politan Decision (Petitioners 1/31/07 filing exhibit Reply B page 19 para 1)

> Commitments and shortfalls are little more than **illusory concepts** in the reseller industry—concepts which constantly undergo renegotiation and **restructuring.** The only "tangible" concern at this juncture is the service AT&T provides. The Court is satisfied that such

[1] It must be noted that not only hasn't AT&T provided any evidence to the FCC of traffic only transfers that support its theory, AT&T has not refuted that it violated section 2.5.7, nor refuted that it violated the FCC Oct 1995 order extending the June 17th 1994 grandfather provision, nor addressed the August 26th 1996 shortfall credit.

> services and their costs are protected. To the extent however that **AT&T's demand for fifteen million dollars' security is premised on the danger of shortfalls,** the Court finds that threat neither pivotal to the instant injunction nor properly substantiated by AT&T.

AT&T premised its request for the $15 million dollars based upon AT&T's so called likelihood of shortfalls resulting on the transferors plan—not on AT&T's new bogus position that PSE did not want to accept shortfall and termination obligations.

AT&T requested the $15 million injunction bond because AT&T acknowledged that under the tariff the plans revenue commitment stayed with CCI on a traffic only transfer and AT&T argued that the plans would go into shortfall.

Judge Politan agreed with AT&T that under the tariff the plan commitments stayed with CCI and did not transfer to PSE----but Judge Politan accurately explained that petitioner's plans could be restructured to avoid shortfall charges.

AT&T's entire bogus attempt to utilize its fraudulent use provision was based upon its acknowledgement that CCI/Inga would have the revenue commitment on its CSTPII/RVPP plans but most of the traffic would be on PSE's CT-516.

District Court's 1995 **non vacated** Decision found in petitioners exhibit Reply-A in its
1/31/07 filing on page 9 para 2:

> Moreover, plaintiffs allege that AT&T has further violated the Act by failing to comply with the plain terms of its own tariff, **namely section 2.l.8,** which makes no reference to any deposit requirement and contains no cross-reference to that section of the tariff which allows deposit demands, namely section 2.5.8. Additionally, plaintiffs allege that AT&T's danger of losing on the Inga companies' commitments **was less after the Inga companies/CCI transfer than before.**
>
> **For instance, plaintiffs point out that under the tariff rule of transfer:** (i) AT&T had security in the fact that it. AT&T, bills the end users directly; (ii) AT&T could pursue CCI for the going-forward non-payments arising from the transferred plans, while having recourse to the Inga' companies for all pre-transfer non-payments; and [iii] that **AT&T could look to CCI and/or the Inga companies for shortfalls in the minimum annual commitment levels under the plans.**

Above Judge Politan confirms that petitioner's traffic only transfer was adhering to the tariff as Judge Politan stated: "**plaintiffs point out that "under the tariff rule of transfer"**

This leaves no doubt that the petitioners were explicitly following the tariff's rules of transfer
and not, as AT&T bogusly asserts, ***proposing*** a transaction outside the tariff rules of transfer.

AT&T Also Conceded the Joint & Several Liability Issue Under the Tariff

AT&T to follow makes the tariffed point that **if** petitioners did a **plan** transfer and not a traffic only transfer, PSE would receive the actual obligations, and petitioners would remain jointly and severally liable for the plan obligations.

This is true because plan obligations did not transfer under the tariff on a traffic only transfer.

Exhibit Z in petitioners 9/27/06 filing:

> Moreover, as AT&T's customers for all of the locations and all of the traffic generated "**under the tariffed" plans, in terms of the *transfer* of such accounts** the Petitioners would, "but for" the attempt to bifurcate the traffic from the **underlying plans**, **remain jointly and severally liable** with the new customer for all obligations existent at the time of the transfer.

Clearly AT&T was **not** talking about a ***proposal*** outside 2.1.8's normal procedure. AT&T was simply confirming that **under the tariffed plans ----in terms of the *transfer* of such accounts** PSE would not get the plan obligations and therefore petitioners would not get the joint and several liability obligations. This is true. CCI continued to have the actual plan obligations and Inga Companies were still jointly and severally liable for the plan obligations as well. AT&T wanted PSE to accept the plan with the actual obligations and have CCI have the joint and several obligations. However that would have required petitioners to give up its plans to PSE and to get the plans back petitioners would have had to post enormous security deposits; therefore a traffic only transfer was ordered and a contract established with PSE to get the traffic back as the FCC noted. This would have given A&T a great incentive to give petitioners its own contract for which AT&T had repeatedly denied.

Petitioners have chosen to refer to the obligations that get transferred to the transferee on a plan transfer as the "actual" obligations and the obligations that remain with the transferor as the joint and several liability obligations. AT&T in an absolute desperate attempt to try and pick a hole in petitioners correct positions states petitioners are wrong in saying that joint and several liability obligations are not actual obligations. Joint and several liability obligations------as in petitioner's joint and several liability obligations on the plans transferred to CCI -------**are**

indeed legitimate or actual obligations just as Joint and several liability obligations just as AT&T states. If AT&T would like for petitioners to use different terminology than "actual" obligations transferred------- to designate the difference between the two--so as not to confuse the allocation of obligations -- we will use whatever term AT&T wishes. At this point AT&T is picking at totally irrelevant "designations" to try and confuse the FCC. AT&T you should know by now that no such nonsense is getting by petitioners. Joint and several liability as per 2.1.8E does not even pertain to traffic only transfers anyway (only plan transfers) as AT&T also correctly argued in 2003 to the FCC.

Termination Charges Issue

As the FCC is aware AT&T explicitly stated in its 1996 brief to the FCC that termination charges are not at issue: AT&T brief to the FCC August 26th 1996 footnote 3:

> "Termination liability" refers to payment of tariffed charges that apply if a term plan is discontinued before the expiration of the term. Section 3.3.1.Q of AT&T's Tariff F.C.C. No. 2. Payment of **termination charges is not at issue here.**

As the FCC noted in its 2003 Decision AT&T acknowledged that petitioners were not terminating its plans.

FCC 2003 Decision Footnote 56 at page 8

> That is consistent with the facts of this matter; petitioners never terminated their plans. Accordingly, termination charges are not at issue in this matter.

AT&T made its statement about petitioner's plans because it acknowledged that petitioners controlled the termination obligations because the termination obligations **did not transfer. Likewise since under 3.3.1Q bullet 10 shortfall and termination are a coupled transferor plan obligations, -------neither does shortfall transfer on traffic only transfers.**

Additionally AT&T was again associating petitioner's transaction **as it applied under the tariff**. AT&T did not argue that petitioner's transaction was a so called ***proposal*** outside the tariff.

AT&T's only argument in 1995 and 1996 was that its tariff had a so called implicit right to mandate that on a "traffic only" transfer when substantially all the traffic

was transferred AT&T could mandate that constituted a **PLAN** transfer. That was the Tr. 8179 attempt that was denied by the FCC.

Of course AT&T when filing 8179 never proposed that an aggregator could do a traffic only transfer as long as the all the plan obligations transferred. That tariff did not allow such as AT&T's November 1995 concession brief states.

The tariff only allowed two options:

1) Traffic only transfer: Plan obligations stay with transferor plan and the remaining accounts not transferred.

2) Plan Transfer: Plan obligations transfer with all traffic

That is why this case was over by default when the DC Circuit ruled 2.1.8 allows traffic only transfers. No such tariff option exists to transfer the plan obligations and have the transferor plan remain with remaining accounts. That is why AT&T can not produce any evidence because none exists!

AT&T Attempt to Change Its Tariff Retroactively for "All Customers" Also Proves Petitioner's Were Not Proposing A Transaction Outside Section 2.1.8's Tariffed Norm

As soon as petitioners submitted its traffic only transaction AT&T recognized that petitioners request would have transferred substantially all of its account traffic to PSE, leaving behind the plans revenue commitments with CCI, because that is the way the tariff worked.

AT&T's Counsels Richard Meade's letter to the FCC's David Nall, explained that AT&T wanted to retroactively enact Transmittal 8179. AT&T filed this as a retroactive tariff change for the entire industry because AT&T understood that plan obligations did not transfer on traffic only transfers. The FCC rejected AT&T's Substantive Cause Complaint to retroactively change the tariff.

As the FCC is aware many aggregators counsels (including the reseller association) submitted petitions to the FCC to reject or suspend AT&T Transmittal 8179. See exhibit R in petitioner's 9/27/06 filing.

All petitions clearly acknowledged that the transferors' revenue commitment does not transfer on a "traffic only" transfer. Thus AT&T's rhetoric that petitioners were attempting to propose a transaction that was outside 2.1.8's norm is obviously false. The entire industry understood and routinely participated in traffic only transfers in which the transferors' revenue commitments did not transfer on a "traffic only" transfer. AT&T's bogus assertion that petitioners ***"proposed"*** a transaction outside

2.18's norm is pure fantasy. The entire industry routinely participated in these permissible traffic only transfers.

AT&T's Counsel David Carpenters statement to the Third Circuit Oral Pg 43 exhibit O in petitioners' initial 9/27/06 filing confirmed the FCC's position that AT&T was attempting to modify the existing tariffs permissibility to transfer "traffic only" without transferring the transferors plan commitments.:

> The FCC asked us to withdraw the complaint because **the FCC thought we had done more in the tariff language than codify** what the tariff already meant because it went beyond prohibiting these sorts of transfers of plans that **would affect transfers of individual locations.**

In fact when AT&T withdrew Tr. 8179 instead of facing adverse determination from the FCC, it warranted to Judge Politan that it was replacing Tr. 8179 with Tr. 9229 and the very reason why AT&T took so long was that AT&T was **getting the entire resale industry involved** to address this tariff issue of how AT&T could "protect itself" from the substantial traffic only transfers that 2.1.8 permitted without the transferor's plan commitments transferring.

After AT&T interacted with the entire resale industry AT&T counsel Mr. Meade certified to District Court Judge Politan that AT&T came up with deposit requirements as the way it was addressing the so called industry wide problem.

AT&T Counsel Meade: (Exhibit N pg.7 para 16 of initial filing)

> The Deposit for Shortfall Charges included in Transmittal No. 9229 is a "new concept" that meets AT&T's business concern more directly, without addressing **the question of intent**. Because this is new, it will apply only to newly ordered term plans, and so would not be determinative of the issue presented on the CCI/PSE transfer.

In the above statement Mr. Meade states that AT&T was addressing "**the question of intent"**. What he is specifically referring to is that AT&T was trying to evaluate whether the aggregator was **intending to transfer away substantially all the traffic without meeting the revenue commitments** --------- that the tariff mandated that these plan commitments must stay with the transferor's plans.

Mr. Meade was clearly acknowledging here that this was a so called AT&T tariff problem that it addressed. AT&T's nonsense that petitioner's were "***proposing***" a transaction that was not within the norm of 2.1.8 is pathetic attempt to cover up.

As already presented by petitioners to the FCC, AT&T later added Deposit Requirements within 2.1.8 in May of 1996 to only the transferor plans, **not** the transfer**ees'** plan, on a "traffic only" transfer; because of course it was only the transferor's plans shortfall commitments that remained with the transferor. The bottom line is that petitioner's transaction was clearly understood as permissible under the tariff and not a proposal outside 2.1.8, as AT&T addressed its perceived problem as an entire industry tariff issue.

The FCC should be thoroughly **insulted** that AT&T would actually expect that it could get the FCC staff to believe in AT&T's ***"proposal"*** defense; utilized by AT&T to try and cover–up for AT&T's clear obligations concession in its November 28th 1995 brief to Judge Politan.

AT&T has yet to Create a Cover-up for Its Counsel Mr. Carpenter's Statements to the Third Circuit

Mr. Carpenter's statements to the D.C. Circuit confirmed that he fully understood the tariff when he was directly asked by Judge Roberts what "all obligations" meant. Mr. Carpenter correctly explained that what "all obligations" meant varied, depending upon what's transferred.

> Mr. Carpenter: Yes, but what it means to assume all the obligations. What obligations apply may vary depending on what's transferred.
>
> Mr. Carpenter: Now what obligations they are going to end up assuming will vary depending on what service is being transferred.

AT&T attempted to cover-up for Mr. Carpenter's DC Circuit November 2004 statement by incredibly stating that what Mr. Carpenter was referring to in the above quotes was the **fictitious** de minimus traffic transfer section of the tariff.

Additionally, AT&T incredibly stated that what Mr. Carpenter was referring to in the above quotes was to a conversation that he was having a few pages earlier with a different DC Circuit Judge!!!! What makes this AT&T statement even more bogus was that Mr. Carpenter was replying in the above quotes to a specific question from Judge Roberts regarding what "all obligations meant!!!

Now turn back the clock 8 years earlier to 1996 and see Mr. Carpenter's statement to the Third Circuit:

AT&T Counsel David Carpenter supporting petitioners during Third Circuit Oral Argument:
See exhibit V in petitioners filing Pg 15 line 9:

> We point out in our brief that there's a ***distinction*** between transfers of entire plans, and transfers of individual end-users locations. That when the "**plan"** is transferred, **"all the obligations"** have to go along with it.

See Mr. Carpenter again at exhibit V. in petitioners 9/27/06 filing Pg 15 line 23:

> When you're transferring **all the traffic,** you're transferring the **plan**. That is –and the obligations have to go with it, shortfall and termination liability.

Petitioners did not transfer **all the traffic** as Mr. Carper states. Petitioner's understood the tariff explicitly as petitioner's were the leaders in the industry as the AT&T Revenue at Risk report shows at exhibit HH in petitioner's 9/27/06 filing.

AT&T has provided many comical cover-ups but it has yet to provide one of its comical cover ups for the above Mr. Carpenter 1996 Third Circuit statements.

Maybe AT&T can say that Mr. Carpenter is actually the second coming of Nostradamus!!! Then AT&T can state that what Mr. Carpenter was actually referring to in **1996** was the conversation that he knew he was going to have with the DC Circuit Judge 8 years later in **2004** about the fictitious de minimus "traffic only" transfer section that AT&T conjured up!!!

Please AT&T, while you are gathering up all the evidence showing transferees accepting plan obligations on "traffic only" transfers please give us some more comic relief and explain what Mr. Carpenter "really meant" before the Third Circuit. We can't wait!

AT&T Attempts to Cover the Obvious Fact that the FCC Used Section 3.3.1.Q bullet 4 to Determine the Movement of Accounts But Used Section 2.1.8 to Determine which Obligations Transfer

Petitioners evidenced that the FCC Decision under the heading 2.1.8 explicitly stated what the obligations allocation was between CCI/Inga and PSE on the traffic only transfer. **AT&T did not---- and can not------ refute that the FCC explicitly detailed how each of the obligations should be allocated under the heading 2.1.8.**

Petitioners also accurately showed that the additional FCC 2003 Decision obligations analysis under the Fraudulent Use heading referenced Judge Politan's non vacated Decisions obligations analysis for which AT&T again did not ----and can not ------refute was done under 2.1.8.

AT&T therefore makes a feeble attempt to counter petitioner's accurate depiction of where Judge Bassler made his critical error by making this statement in opposition to petitioners Motion for Summary Decision. See page 3 paragraph 2:

> In the portion of its 2003 decision discussing section 2.1.8, the Commission ruled that this provision " did not address--and therefore **did not preclude or otherwise govern-- the movement of the end-users traffic from one aggregator to another**, as CCI and PSE sought to effect in this case.: Commission 2003 Decision, paragraph 9.

Herein is the confusion of this case. In AT&T's above quote of the FCC 2003 Decision AT&T pulls a quote that references

the "movement" of the end-users traffic from one aggregator to another

How the accounts moved had nothing to do with which obligations transfer on the "traffic only" transfer.

Yes the FCC now knows that it made an error when it stated that section 2.1.8 did not address---- and therefore **did not preclude or otherwise govern-- the movement of the end-users traffic from one aggregator to another**". So the FCC made a mistake and the DC Circuit corrected it and the FCC did not appeal that correct DC Circuit Decision that 2.1.8 allows the movement of traffic only.

The key to the FCC 2003 decision however is that it utilized section 2.1.8 to interpret precisely which obligations are transferred.

Judge Bassler made two errors:

1) Judge Bassler believed the FCC's obligation analysis was as he said: "**soley** under the fraudulent use heading" Obviously it is clear to anyone that Judge Bassler made a critical error.

As petitioners brief clearly evidenced the FCC explicitly detailed obligations analysis was under the **2.1.8 heading--- Not the Fraudulent Use Heading.**

The bulk of the FCC 2003 Decision analysis was under heading 2.1.8 not the Fraudulent Use heading; however even if all of the analysis was under Fraudulent Use it is totally irrelevant.

Such a statement from Judge Bassler would lead one to believe that there are two sets of transfer obligations. There are no extra transfer obligations to determine for fraudulent use. Judge Bassler simply made a critical error.

2) Judge Bassler also got confused with the FCC's above statement that 2.1.8 did not address and therefore **did not preclude or otherwise govern-- the movement of the end-users traffic** that was in reference to only the **movement** of traffic.

The FCC did **not** say that 2.1.8 did not address and therefore **did not preclude or otherwise govern the OBLIGATIONS ALLOCATION ANALYSIS.**

The FCC did not say this!

AT&T master con is to take what the FCC said in relation to account movement and apply it to obligations allocation. Such an AT&T ruse will not get by petitioners.

The FCC in fact explained to the DC Circuit that if it wasn't for the obligations section of 2.1.8 that section wouldn't have any meaning as it related to traffic-only transfers.

See exhibit T of petitioner's 9/27/06 filing which is page 19 and 20 of the FCC's brief to the DC Circuit explaining its 2003 Decision:

> More fundamentally, however, AT&T's argument collapses, because it incorrectly presumes that, apart from the transferee's assumption of liabilities (which occurs under a transfer of plans, but not a transfer of traffic), a transfer of traffic and a transfer of plans yields identical benefits and burdens to AT&T and its customers. That is not the case. Where there is a wholesale transfer of plans pursuant to section 2.1.8 (as in the Inga-to-CCI transactions), the transferee" steps[s] into the shoes of [the transferor]" and *replaces* the transferor as the party liable for any *future* purchases of service. Order, para 9 (JA7) **FOOTNOTE 10**
>
> By contrast, when only traffic is moved, the party reducing its traffic (in this case CCI) "would continue to subscribe to its existing CSTPII plans." And the totality of the reciprocal obligations between that party and AT&T under those CSTPII plans would remain in effect, both with respect to service that had been purchased at the time the traffic was moved *and* with respect to any future service taken under the plans. Order, para. 9 (JA7). Thus, each method of structuring the transaction presents distinct benefits and obligations for both AT&T and the customer, and the Commission's reading **gives meaning to section 2.1.8**

FOOTNOTE 10

The transferor does remain liable for "outstanding indebtedness" and the "unexpired portion of any applicable minimum payment" obligation

> existing at the time of the transfer. *See Order*. n.46 (JA6) (quoting section 2.1.8).

So as the FCC explained although it used section 3.3.1.bullet 4 (delete and add accounts paragraph) to interpret the MOVEMENT OF ACCOUNTS it used section 2.1.8 to interpret the OBLIGATIONS ALLOCATION. No harm done. Just enough confusion for AT&T to scam the Courts.

Additionally, the fact that the FCC made an error in using section 3.3.1.bullet 4 to interpret how "traffic only" could move in bulk does not in any way affect the FCC's correct 2.1.8 obligations allocation analysis.

The FCC specifically states that it interpreted 2.1.8 in rejecting AT&T's position that S&T obligations transfer: Here again at exhibit T in petitioners 9/27/06 brief is an excerpt from page 10 of the FCC's brief to the DC Circuit Court.

> In arriving at the conclusion that section 2.1.8 of Tariff No. 2 did not prohibit the requests made by CCI and PSE to transfer traffic, the Commission rejected AT&T's contention that section 2.1.8 did not permit the transfer of traffic without a plan unless the transferee assumed the original customers liability. Id. at para. 9 (JA 6-8) The Commission stressed, however, that even with the transfer of traffic, CCI still would have to meet its tariffed commitments.

And, once again, the FCC confirms that S&T obligations remain with petitioners' plans. Here again within petitioner's 9/27/06 exhibit T is the FCC's correct position on page 11 of its brief to the DC Circuit.

> The commission concluded that CCI's obligations remained under the CSTPII and RVPP plans, and that "AT&T's apparent speculation that CCI would fail to meet these commitments and would be judgment-proof did not justify its refusal to transfer the traffic in question.

The FCC simply took the same position as Judge Politan's non vacated District Court Decision, which used section 2.1.8's obligations language to interpret and determine which obligations transfer on traffic only transfers. The fact that the FCC Decision notes that the Inga Companies were still jointly and severally liable is conclusive that 2.1.8's obligation language was used.

The FCC's delete and add accounts analogy under 3.3.1.Q bullet 4 exhibit D, does not even have the joint and several liability provisions in it; so the FCC was clearly using 2.1.8's obligation language to decide which obligations transfer, even though

the FCC used 3.3.1.Q bullet 4 (delete and add) to state "how" the traffic could transfer. There is no bulk transfer obligations language at all even within section 3.3.1.Q's general CSTPII provisions.

The comical part of AT&T's position that the FCC couldn't have used section 2.1.8 to address the obligations:

> [because the FCC stated that section 2.1.8 "did not address--and therefore did not preclude or otherwise govern-- the "movement of the end-users traffic" from one aggregator to another]

is that AT&T can not even suggest where else in its tariff could the FCC have possibly used a different bulk transfer obligations language. Section 2.1.8 is AT&T's bulk transfer section and it is the only section in the tariff that contains such bulk transfer obligations language. There is absolutely no question that the FCC's 2003 Decision interpreted petitioner's traffic only transfer utilizing the obligations language of section 2.1.8.

The Law of the Case

The Law of the Case designates that if an appellate court has not decided a legal question and case goes to a lower court for further proceedings, **the legal question, not determined by the appellate court will not be differently determined on a subsequent appeal in the same case where the facts remain the same.** *Allen v. Michigan Bell Tel. Co.*, 232 N.W.2d 302, 303.

The Law of The Case also provides that an appellate court's determination on a legal issue is binding on both the trial court and FCC **and an appellate court on a subsequent appeal** given the same case and substantially the same facts. *Hinds v. McNair*, 413 N.E.2d 586, 607.

The facts are exactly the same as it relates to the FCC's use of 2.1.8 to interpret and determine the proper allocation of obligations. The only change is in reference to how accounts could transfer, and since the FCC did not appeal the DC Circuit because the FCC saw where it went wrong on the "how to" side of the equation, that did not diminish or effect the FCC's proper interpretation on the obligations allocation question.

The FCC having already agreed with the non vacated District Court on its obligations allocation analysis and the DC Circuit not having decided the obligations issue has under the Law of the Case decided the obligations issue.

When the DC Circuit correctly determined that 2.1.8 does allow traffic only transfers as well as entire plan transfers the totality of petitioners 2.1.8 traffic only transfer was answered. By law the case is over and petitioners prevail.

AT&T Actually Counted The Times Petitioners Needed to Use the words Fraud, Bogus- and Con to Describe AT&T's Arguments

Petitioner's are obviously frustrated at what AT&T has been able to get away with for 12 years and the FCC should be upset as well as AT&T is the FCC's intelligence. However, here comes AT&T with its attack the attacker strategy because every one of its pathetic defenses has been **totally destroyed by petitioners**. Petitioners have proved to anyone who knows this case that AT&T counsel are working in concert to scam the Courts and the FCC.

The record is loaded with evidence of AT&T counsel's egregious misrepresentations to the Court and the FCC. AT&T is fooling no one at the FCC this time around. The FCC staff should be thoroughly insulted that AT&T has the audacity to deliberately lie to the FCC and expect the FCC to actually believe AT&T's constantly changing bogus defenses. AT&T can't even keep its lies straight anymore because there have been so many of them that they are all conflicting.

Just look at pages page 66- 69 of Petitioner's 1/31/07 brief. Under the heading: **Oh Where, Oh Where, Has My Shortfall Gone.** AT&T started out with shortfall is in minimum payment period then switched and said it was not within minimum payment period then went back to shortfall is in minimum payment period then decided that shortfall obligations are no longer in minimum payment period!!!

The record shows that AT&T Counsel Richard Brown actually switched his position with Judge Bassler within months! The heavy smoke just keeps on coming. How can AT&T know that its shortfall transfers when AT&T can't even decide where the shortfall obligations supposedly are? There are no shortfall obligations listed in 2.1.8 as the DC Circuit stated at page 11's footnote 2.
Tariffs must be explicit!! AT&T loses period!

Imagine the Courts and the FCC have allowed these so called officers of the Court to last 12 years without presenting a stitch of evidence to support their bogus position. What a complete mockery of the judicial system.

Here is how AT&T wraps up its argument on page 4 of its opposition to petitioners motion for Summary Decision:

> Their efforts to prevail on the basis of trumped up "concessions" betrays a well-founded concern that the Commission will rule that the phrase "all obligations" naturally includes a **transferor's obligation to pay shortfall charges**.

Now you got it right AT&T!!! Yes you're right the **transferor** does keep its obligations on a "traffic only" transfer to pay for shortfall charges. Freudian slip?

AT&T you just forgot the other part of AT&T November 1995 Mr. Whitmer concession that, -----as Judge Politan also stated-----under the tariff PSE is **not obligated** to assume the plan obligations.

AT&T's has made comical and feeble attempts to:
1) Cover-up for Judge Bassler's critical (fraudulent use heading) error
2) Cover-up for its November 1995 concession brief.

Couple these pathetic cover-ups with the fact that AT&T
1) **can not produce any evidence** of its bogus position,
2) can't come up with a logical defense for all of its obligations concessions made by its counsels Mr. Carpenter, Mr. Fash, and Mr. Friedman
and this more than justifies that the FCC must issue a Declaratory Ruling, as per the law of the case, in petitioners favor on this traffic only transfer issue.

AT&T is simply attempting to engage in creative revisionist history but there is simply too much evidence and too many conflicting AT&T egregious lies that prove AT&T is once again trying to scam the FCC. Do not let it happen this time.

Respectfully Submitted
One Stop Financial, Inc
Winback & Conserve Program, Inc.
Group Discounts, Inc.
800 Discounts, Inc

/s/ Al Inga
Al Inga President